Supreme Court, U.S.
FILED

94 370 AUG 29 1994

OFFICE OF THE CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM 1994

WILLIAM S. FUNDERBURG,
Petitioner,

v.

UNITED STATES RAILROAD RETIREMENT BOARD,
Respondent.

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Alexander M. Hall
Counsel of Record
718 Market Street
Wilmington, North Carolina 28401
(910) 343-8433

Counsel for Petitioner

68 pp

QUESTION PRESENTED

I. Does a United States court of appeals have subject matter jurisdiction to review whether the Railroad Retirement Board abused its discretion in refusing to reopen a denied disability claim after the Social Security Administration awarded claimant disability,using identical standards and rules for determining disability as are used by the Railroad Retirement Board?

TABLE OF CONTENTS

Table of Authorities.....i

Prior Decisions in this Case.....1

Grounds for Jurisdiction.....3

Statement of the Case.....4

Argument.....9

Appendix.....19

TABLE OF CASES AND AUTHORITIES

CASES

Bennett v. Tucker, 827 F.2d 63 (7th Cir. 1987).16

Burleson v. R.R. Retirement Bd., 711 F.2d 861 (8th Cir. 1983).....15

Califano v. Sanders, 430 U.S. 99(1970)10-11,13,18

Sones v. United States R.R. Retirement Bd., 933 F.2d 636(8th Cir. 1991).....10,13-18

Steebe v. United States R.R. Retirement Bd., 708 F.2d 250(7th Cir.), cert. denied, 464 U.S. 997 (1983).....10,11-13,15,16,18

STATUTES

Social Security Act § 205(g), 42 U.S.C.A. § 405(g)(West 1986).....11,App.46

Railroad Retirement Act § 2(a)(1)(iii), 45 U.S.C.A. § 231a(a)(1)(iii)(West 1986)....5 App.49

Railroad Retirement Act § 2(a)(1)(v), 45 U.S.C.A. § 231a(a)(1)(v)(West 1986).....4,7,App.49-50

Railroad Retirement Act § 8, 45 U.S.C.A. § 231g (West 1986).....8,12,App.51

Railroad Unemployment Insurance Act § 5(c), 45 U.S.C.A. § 355(c)(West Supp. 1994).....12,App.51

Railroad Unemployment Insurance Act § 5(f), 45 U.S.C.A. § 355(f)(West Supp. 1994)....8,12,App.58

OTHER AUTHORITIES

Railroad Retirement Board Order 75-5, Section 17.B.....14-15,App.63

PRIOR DECISIONS IN THIS CASE

1. August 18, 1978: Bureau of Retirement Claims of Railroad Retirement Board denied Petitioner's claim for a disability annuity under the Railroad Retirement Act.

2. February 18, 1978: Decision of Appeals Referee for Railroad Retirement Board sustaining decision denying Petitioner's application for disability annuity.

3. December 3, 1981, Board Order 81-170: Three member panel of the Railroad Retirement Board issued Board Order unanimously affirming and adopting decision of Appeals Referee denying Petitioner a disability annuity.

4. June 4, 1985: Railroad Retirement Board awarded Petitioner an annuity for early retirement, based on application filed April 24, 1985, beginning May 1, 1985.

5. November 14, 1988: Decision of Appeals Council of Social Security Administration, on remand from the United States District Court for the Eastern District of North Carolina, holding that Petitioner was entitled

to a disability benefit under the Social Security Act, retroactive to 1977.

6. June 19, 1989: Railroad Retirement Board notified Petitioner by letter of recertification of Petitioner's railroad retirement annuity because of an offset caused by an increased social security benefit.

7. May 4, 1990: Railroad Retirement Board notified Petitioner by letter that his request for reconsideration of the recertification of his railroad retirement annuity was denied.

8. July 9, 1990: Railroad Retirement Board notified Petitioner by letter that no hearing would be heard on his appeal, filed May 22, 1990.

9. January 28, 1991, Decision No. 91-253: Hearings Officer for the Railroad Retirement Board issued decision denying Petitioner's appeal on the basis that the Board's 1981 decision denying his claim for disability benefits had not been appealed and was therefore administratively final.

10. May 14, 1992, Board Order 92-144: Railroad Retirement Board affirmed decision of hearings officer not to reopen the Board's final 1981 decision with respect to Petitioner's application filed in 1978. The Board awarded Petitioner a disability annuity based upon Petitioner's application for a retirement annuity, filed in 1985.

11. May 4, 1994, Case No. 93-1579: United States Court of Appeals for the Fourth Circuit dismissed Petitioner's Petition for Review of an Order of the Railroad Retirement Board by unpublished per curiam opinion for lack of subject matter jurisdiction.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the unpublished per curiam opinion, entered May 4, 1994, by the United States Court of Appeals for the Fourth Circuit dismissing Petitioner's appeal for lack of subject matter jurisdiction.

Petitioner's Petition for Rehearing and Suggestion for Rehearing in Banc was denied by the United States Court of Appeals for the Fourth

Circuit by an Order entered May 31, 1994. This Petition For Writ of Certiorari is submitted within ninety days after entry of the Order.

Jurisdiction in this Court is conferred by 28 U.S.C.A. § 1254(1) (West 1993) upon issuance of Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, William S. Funderburg, filed an application on May 22, 1978 for a disability annuity under section 2(a)(1)(v) of the Railroad Retirement Act (RRA), 45 U.S.C.A. § 231a(a)(1)(v) (West 1986) (App. 49,50). Petitioner previously had filed for social security disability benefits in 1977. Petitioner's application for a disability annuity under the RRA was denied and the denial was affirmed by an appeals referee. On December 3, 1981, the Railroad Retirement Board (RRB) affirmed and adopted the decision of the appeals referee denying the disability annuity. Petitioner did not appeal the RRB's decision to a United States court of appeals. Petitioner did, however, continue to pursue his action for disability benefits through the Social

Security Administration (SSA), a parallel government agency which uses the same rules and standards for awarding disability benefits as the RRB.

On April 24, 1985, Petitioner filed a second application with the RRB for a reduced-age retirement annuity under section 2(a)(1)(iii) of the Railroad Retirement Act, 45 U.S.C.A. § 231a(a)(1)(iii) (West 1986) (App. 49). Petitioner was awarded an age and service annuity, reduced for early retirement, effective May 1, 1985.

After extended hearings and appeals, spanning eleven years, the Social Security Appeals Council, on remand from the United States District Court for the Eastern District of North Carolina, held, in November 1988, that Petitioner was entitled to a disability benefit, retroactive to April 1977.

In 1989, Petitioner's railroad retirement annuity was adjusted and lowered due to his award of an increased social security benefit. Petitioner requested and was denied

reconsideration of the adjustment.

On May 25, 1990, Petitioner filed an appeal with the RRB's Bureau of Hearings and Appeals contesting both the RRB's calculation of his benefits after having been awarded social security disability benefits and the effective date upon which they accrued. Petitioner argued that the RRB should reopen its 1981 decision denying him disability benefits and honor the award of disability benefits which had finally been granted, after many years of appeals, by the SSA, a federal agency which uses the same standards and rules to determine disability as those used by the RRB. Petitioner contended that he should be awarded retroactive disability benefits through railroad retirement, based upon his 1978 disability annuity application.

The Board Hearings Officer notified Petitioner that a hearing would not be held on his appeal because the issue presented was solely a question of law.

The hearings officer issued a decision on January 28, 1991 (Decision No. 91-253, App. 24)

holding that Petitioner's retirement annuity had been calculated correctly and that the 1981 Board decision denying Petitioner a disability benefit based on the 1978 application was administratively final because it had not been appealed to a United States court of appeals and would not be reopened.

Petitioner appealed the hearing officer's decision to the Three-Member Board which entered its final decision on May 14, 1992 (Board Order 92-144, App. 40) in which a majority of the Board affirmed the hearing officer's decision not to reopen the Board's 1981 decision denying Petitioner a disability annuity based on the 1978 application. However, based upon its consideration of the record, the Board found that Petitioner was entitled to a disability annuity under section 2(a)(1)(v) of the Railroad Retirement Act, based on Petitioner's second application for an age and service annuity filed in 1985. Petitioner was awarded a disability annuity with a beginning date to be calculated no earlier than April 1, 1984. It should be noted

that Petitioner has not received any payments for disability from the RRB as of this date.

Petitioner appealed the decision of the RRB refusing to reopen and review its original 1981 decision denying him a disability benefit, based upon his first application of 1978, to the United States Court of Appeals for the Fourth Circuit. Jurisdiction to the Fourth Circuit was pursuant to section 8 of the Railroad Retirement Act, 45 U.S.C.A. § 231g (West 1986) (App. 51) and section 5(f) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C.A. § 355(f) (West Supp. 1994)(App. 40). Petitioner's appeal to the Fourth Circuit was brought within one year of the RRB's final order, entered May 14, 1992, which disposed of all claims of Petitioner (Board Order 92-144, App. 40).

The United States Court of Appeals for the Fourth Circuit dismissed Petitioner's appeal by unpublished per curiam opinion, entered May 31, 1994, on the ground that the court lacked subject matter jurisdiction to review the RRB's decision not to reopen an earlier denial of a claim (App.

20).

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing In Banc before the United States Court of Appeals for the Fourth Circuit which was denied by an Opinion entered May 31, 1994 (App. 44).

ARGUMENT

PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED WHERE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DISMISSED PETITIONER'S APPEAL IN RELIANCE ON A DECISION OF A UNITED STATES COURT OF APPEALS, ARGUABLY BASED UPON A DECISION OF THE UNITED STATES SUPREME COURT, WHICH IS IN DIRECT CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS.

Petitioner appealed a decision of the Railroad Retirement Board (Board Order 92-144, App. 40), denying Petitioner's request that a 1981 Board decision denying Petitioner a disability annuity based on his 1978 application be reopened to the United States Court of Appeals for the Fourth Circuit. The court of appeals dismissed Petitioner's appeal, holding that absent extraordinary circumstances, a decision of the Railroad Retirement Board not to reopen an earlier denial of a claim is not subject to

judicial review (App. 20). The Fourth Circuit relied on Steebe v. United States Railroad Retirement Board, 708 F.2d 250 (7th Cir.), cert. denied, 464 U.S. 997 (1983), which was based, in part, on the reasoning in Califano v. Sanders, 430 U.S. 99 (1970). The decision of the Fourth Circuit in this case, as based upon the Steebe decision of the Seventh Circuit, is in direct conflict with the more recent decision of the Eighth Circuit in Sones v. United States Railroad Retirement Board, 933 F.2d 636 (8th Cir. 1991), upon which Petitioner relies.

A. Califano v. Sanders, 430 U.S. 99(1970):

In Sanders, the denial of an individual's 1964 application for a disability benefit under the Social Security Act was appealed through the administrative appellate levels of the SSA, ending with a decision by the Appeals Council of the SSA affirming the denial of the benefit. Sanders did not pursue judicial review of the final decision to federal court.

Sanders later filed a second claim for disability alleging the same grounds for

eligibility as were presented in the first claim. The SSA found that Sanders' second claim was barred by res judicata and denied a reopening of his prior application. Id. at 102-103.

Sanders filed an action in federal district court challenging the SSA's refusal to reopen his earlier claim. Id. at 103. The Supreme Court held that section 205(g) of the Social Security Act, 42 U.S.C.A. § 405(g) (West 1986) (App. 46), did not authorize judicial review of a final decision of the Secretary of Health and Human Services not to reopen a claim for benefits. Id. at 107-108.

B. Steebe v. United States R.R. Retirement Bd., 708 F.2d 250 (7th Cir.), cert. denied, 464 U.S. 997 (1983):

In Steebe, the petitioner applied in 1956 for a disability annuity under the RRA which was denied. 708 F.2d at 251. Steebe requested reconsideration of the denial of his eligibility for benefits in both 1959 and 1961 and was denied on each occasion. Id. at 251-52. Steebe did not seek administrative or judicial review of these decisions. Id. at 252.

Steebe filed a second application for a disability annuity in 1965 which was granted and made retroactive to 1964. Id.

In 1981 Steebe requested that the denial of his earlier 1956 claim for disability be reopened. Id. The RRB denied the request and Steebe appealed the refusal to reopen to the Seventh Circuit. Id.

The Steebe court examined the statutory provisions allowing for judicial review of Board decisions in section 8 of the Railroad Retirement Act, 45 U.S.C.A. § 231g (West 1986)(App. 51)which incorporates by reference the provisions pertaining to judicial review set forth in section 5(f) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C.A. § 355(f) (West Supp. 1994) (App. 58), which allows review by a court of appeals of a final decision of the Board on matters set forth in section 5(c) of the RUIA, 45 U.S.C.A. § 355(c) (West Supp. 1994) (App. 51). Id. at 252-255.

In summary, the Seventh Circuit found that, absent a constitutional challenge, the statutes

cited above provided for judicial review by the United States courts of appeals only in an appeal from a final decision which was the Board's original denial of a claim. Id. at 254. The court held that it lacked jurisdiction to review a Board decision refusing to reopen a claim. Id.

The Steebe court held that the reasoning of the Supreme Court in Sanders, holding that the SSA did not give district courts subject matter jurisdiction to review a decision of the Secretary not to reopen a claim for benefits, was also applicable to the RRA. Id. at 255.

C. Sones v. United States R.R. Retirement Bd., 933 F.2d 636 (8th Cir. 1991).

In Sones, the claimant appealed a denial of an application for disability benefits under the RRA to the three-member Railroad Retirement Board, which affirmed the denial. 933 F.2d at 637. Sones did not appeal this decision to a United States court of appeals.

Sones later requested that the RRB reopen his case "in light of a decision of a Social Security ALJ . . . which found claimant to be

disabled under the Social Security Act." Id. (footnote omitted). The Board refused to reopen its decision and claimant appealed the refusal to the Eighth Circuit. Id.

The Sones court held that it did have subject matter jurisdiction to review the RRB's decision refusing to reopen the claim for an abuse of discretion. Id. at 638.

The court further held that the RRB has discretionary authority to reopen a claim, as established by section 17 of Board Order 75-5. Id. The court examined section 17.B (App. 63) which states as follows:

> B. Reopening of an errneous decision denying a claim and a certification with a view to increasing the amount thereof.

A decision denying a claim, which decision is subsequently found to be erroneous, may be reopened with a view to increasing the amount thereof. Factors to be taken into consideration in determining whether such decision or certification is to be reopened include, but are not limited to, the following:

> (1) The resposibility of the applicant in not providing the new evidence, if any, upon which the request for reopening is based, at the time the original claim was made or at some other time prior to the date of the request for reopening;
>
> (2) The weight or probative value of any

new evidence;

(3) The responsibility of the Railroad Retirement Board in previously applying law or evaluating evidence incorrectly.

Id.

The court found that subsection (2) of section 17.B was particularly relevant to a case such as Sones, in light of the court's previous holding in Burleson v. Railroad Retirement Board, 711 F.2d 861 (8th Cir. 1983). Id. The court quoted Burleson, where it was stated:

> 'The standards and rules for determining disability under the Railroad Retirement Act are identical to those under the more frequently litigated Social Security Act, and it is the accepted practice to use social security cases as precedent for railroad retirement cases.'

Id. (quoting Burleson, 711 F.2d at 862)(citing Romaker v. R.R. Retirement Bd., 733 F.2d 639, 641 (8th Cir. 1984)).

The Sones court refuted the Board's reliance on Steebe as support for its position that the court was without jurisdiction to review the Board's refusal to reopen the claim. Id. Steebe was found to be factually distinguishable from

Sones in that "Steebe did not involve two disability claims to two different agencies (which supposedly employ identical standards and rules for determining disability) resulting in two completely different rulings on those claims." Id.

The court noted further that the Seventh Circuit had subsequently limited its own holding in Steebe to the particular facts of that case, as stated in Bennett v. Tucker, 827 F.2d 63, 73 n.7 (7th Cir. 1987). Id. at n.2.

The Sones court ultimately held that the Board had abused its discretion "by refusing to reopen claimant's case in light of the social security ruling." Id. In conclusion, the court stated:

> It is disconcerting to note that two government agencies looked at the same set of facts under the same rules and came up with two different decisions. The effect of this is to create a public image of unfairness and conflict within the government.

Id.

CONCLUSION

The case at bar is similar to Sones, factually and conceptually, in that this case also involves a situation where a claimant was denied a disability benefit by the RRB, sought an equivalent disability benefit through the SSA, was ultimately awarded a social security disability benefit, and then requested that the RRB reopen its denial of claimant's case in light of the subsequent social security ruling.

Petitioner's case is factually different from Sones in that Petitioner had to pursue his appeal through the SSA and federal court for eleven years. This fact actually strengthens the argument that the reasoning of Sones, that it creates "a public image of unfairness and conflict within the government" to allow two disability claims to proceed through two federal agencies using identical standards and rules for determining disability which result in "two completely different rulings on those claims," is applicable to this case. Because Petitioner had to endure appealing his claim through social

security for a more extensive period of time than Sones does not make the reasoning of Sones inapplicable to this case.

The decisions in Steebe and Sanders did not address a situation where a disability claim had been concurrently processed through two parallel federal agencies which use the same standards for determining eligibility.

The Fourth Circuit's reliance on Steebe, as arguably supported by Sanders, in dismissing Petitioner's appeal, was in direct conflict with Sones and has thereby created an irreconcilable conflict between the United States court of appeals. It is respectfully requested that this Petition for Writ of Certiorari be granted so that this conflict may be resolved by the United States Supreme Court.

Respectfully submitted this 26th day of August, 1994.

ALEXANDER M. HALL
Counsel for Petitioner
718 Market Street
Wilmington, North Carolina 28401
(910) 343-8433

APPENDIX

INDEX

United States Court of Appeals for the Fourth Circuit Unpublished Opinion (1994).....20

Decision No. 91-253 of the Hearings Officer of the Railroad Retirement Board (1991).....24

Railroad Retirement Board Order 92-144.....40

United States Court of Appeals for the Fourth Circuit,Order Denying Petition for Rehearing and Suggestion for Rehearing In Banc.....44

Social Security Act § 205(g), 42 U.S.C.A. § 405(g)(West 1986).....46

Railroad Retirement Act § 2(a)(1)(iii),45 U.S.C.A. § 231a(a)(1)(iii) (West 1986).....49

Railroad Retirement Act § 2(a)(1)(v), 45 U.S.C.A. § 231a(a)(1)(v)(West 1986).....49,50

Railroad Retirement Act § 8, 45 U.S.C.A. § 231(g) (West 1986).....51

Railroad Unemployment Insurance Act § 5(c), 45 U.S.C.A. § 355(c)(West Supp.1994).....51

Railroad Unemployment Insurance Act § 5(f), 45 U.S.C.A. § 355(f)(West Supp. 1994).....58

Railroad Retirement Board Order 75-5, Section 17.B.....63

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM S. FUNDERBURG,)
Petitioner,)
)
v.) No. 93-1579
)
U.S. RAILROAD RETIREMENT BOARD,)
Respondent.)

On Petition for Review of an order of the Railroad Retirement Board. (A-238-20-5913)

Submitted: March 22, 1994

Decided: May 4, 1994

Before WILKINSON and HAMILTON, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

OPINION

PER CURIAM:

William S. Funderburg appeals from the Railroad Retirement Board's ("the Board") decision not to reopen an earlier denial of his claim. Absent extraordinary circumstances, a decision of the Board not to reopen an earlier

denial of a claim is not subject to judicial review. Accordingly, we dismiss this appeal for lack of subject matter jurisdiction since we find no such extraordinary circumstances.

I.

On May 22, 1978, Funderburg applied for a disability annuity with the Board. On December 3, 1981, the Board found that Funderburg was not totally and permanently disabled within the meaning of the Railroad Retirement Act. Funderburg did not appeal that decision.

Approximately three and a half years later, Funderburg filed a second application for benefits. The Board awarded Funderburg an annuity based on early retirement beginning May 1, 1985. Funderburg did not request a reconsideration of the Board's determination.

On May 22, 1990, Funderburg appealed to the Board's Bureau of Hearings and Appeals. Because Funderburg had not appealed the 1981 Board order denying his claim for disability benefits, the hearing officer issued a decision, holding that the denial of his 1978 application was

administratively final. Funderburg appealed. The Board affirmed the decision of the hearing officer not to reopen the 1981 denial of Funderburg's 1978 application, but determined that the evidence warranted reopening the reduced annuity awarded in 1985. Funderburg appeals the decision not to reopen the earlier denial of his claim.

II.

Pursuant to 45 U.S.C.A. § 355(c) (West Supp. 1993), the Board may review decisions on initial claims filed under the Railroad Retirement Act. A request for reopening a previously filed claim is not a request for an initial decision; rather, the claimant asks the Board to take a second look at an earlier decision. Steebe v. United States R.R. Retirement Bd., 708 F.2d 250, 254-55 (7th Cir.), cert. denied, 464 U.S. 997 (1983). This Court has jurisdiction to review final decisions issued pursuant to § 355(c). See 45 U.S.C.A. § 355(f)(West Supp. 1993). Absent extraordinary circumstances, a decision of the Railroad Retirement Board not to reopen an earlier denial

of a claim is not subject to judicial review. See Califano v. Sanders, 430 U.S. 99, 107-08 (1977)(holding that Court of Appeals lacks jurisdiction to review denial to reopen claims for social security benefits); Steebe, 708 F.2d at 254-55. Therefore, since Funderburg does not challenge the constitutionality of the Board's decision, this Court lacks jurisdiction to review the Board's decision not to reopen the case. See Califano, 430 U.S. at 108-09. Thus, we dismiss this appeal for lack of subject matter jurisdiction.

DISMISSED

DECISION OF THE HEARINGS OFFICER

Mr. William S. Funderburg Decision No. 91-253

4321 Blue Clay Road Appeal No. 90-686

Castle Hayne, North Carolina 28482

R.R.B. No. A-238-20-5913

January 28, 1991

PROCEDURAL HISTORY

The appellant filed an application for a disability annuity under the Railroad Retirement Act on May 22, 1978. He was denied the disability annuity in a letter dated August 18, 1978 and filed an appeal on August 13, 1979. In a decision dated February 18, 1981, an appeals referee upheld the denial of the disability annuity. The appellant appealed this decision to the Three-Member Board on August 13, 1981. In a Board Order dated December 10, 1981, the Three Member Board denied the appeal. The appellant did not appeal this decision to Federal Court. The appellant had also filed for disability benefits under the Social Security Act and was similarly denied.

On April 24, 1985, the appellant filed an

application for a reduced-age retirement annuity under the Railroad Retirement Act. He was awarded an annuity beginning May 1, 1985, the first full month he was age 62. His annuity was reduced for social security benefits based on age rather than disability. He received his annuity continuously until, in 1989, the Board was notified that the Social Security Appeals Council, on remand from the United States District Court, had allowed social security disability benefits beginning April 1, 1977. In accordance with established procedure, the Social Security Administration certified the benefit award to the Railroad Retirement Board to process for payment and simultaneous adjustment of the appellant's railroad retirement annuity. The appellant's railroad annuity was adjusted for his increased social security benefits effective May 1, 1985, the beginning date of his annuity. His social security benefits were processed, withholding $3,214.29 for the corresponding overpayment in his railroad annuity from May 1, 1985 through May 30, 1989. Attorney fees of

$12,246.00 were withheld as authorized by the Social Security Administration, and the remaining difference between what he was due and what he had previously been paid in social security benefits was paid to him in two installments totalling $34,860.01. In a letter dated May 4, 1990, the Chief of Compliance advised the appellant that the amount paid to him was correct. He filed a timely appeal on May 25, 1990, protesting the withholding of social security disability benefits for an overpayment in his railroad annuity, the withholding of the amount of previous social security benefits based on age, and non-payment of interest on the retroactive accrual due him.

In a letter dated July 9, 1990, the appellant was advised that the issue presented by his appeal was solely a matter of law and as such he would not be afforded a hearing. He was provided a draft index of the administrative record with attachments and given 30 days during which he could submit new or additional information in support of his claim. The

appellant did not submit any additional evidence, but he did send a telegram to the hearings officer dated September 23, 1990 requesting status of a decision on his appeal.

ISSUES

The issues in this case are whether the appellant's annuity was properly adjusted for his social security benefits and whether the withholding of benefits for an overpayment in his railroad annuity, and for prior benefits based on age, was proper.

APPLICABLE LAW AND REGULATIONS

The tier I portion of an employee's annuity rate is provided by Section 3(a)(1) of the Railroad Retirement Act, and states as follows:

> "The annuity of an individual under section 2(a)(1) of this Act shall be in an amount equal to the amount (before any reduction on account of age and before any deductions on account of work) of the old-age insurance benefit or disability insurance benefit to which such individual would have been entitled under the Social Security Act if all of his or her service as an employee after December 31, 1936, had been included in the term 'employment' as defined in that Act."

Section 3(m) of the Railroad Retirement Act provides for the offset in the railroad annuity for social benefit entitlement:

> "(m) The annuity of any individual under subsection (a) of this section for any month shall, after any reduction pursuant to paragraph (iii) of the section 2(a)(1), be reduced, but not below zero, by the amount of any monthly benefit (before any deductions on account of work) payable to that individual for that month under title II of the Social Security Act."

Inasmuch as the tier I portion of a railroad retirement annuity is computed in accordance with the Social Security Act, it must be reduced by the equivalent dollar amount of any social security benefit to which the annuitant is entitled. The authority for this reduction is found in section 292(k)(3)OAP of that Act. It reads as follows:

> "If an individual is entitled to an old age or disability insurance benefit for any month and to any other monthly insurance benefit for such month, after any reduction under subsection (q), subsection (e)(2) or (f)(3), and any reduction under section 203(a), shall be reduced, but not below zero, by any amount equal to such old-age or disability insurance benefit (after reduction under

subsection (q))."

Section 10(a) of the Railroad Retirement Act provides the authority for the Board to recover a railroad annuity overpayment caused by an accrual that may be certified for payment from the Social Security Administration.

> * * * The Board shall have the authority to recover from any payment which would be made to an individual by the Board under section 7(b)(2) of this Act the amount of annuity payments made to such individual which are erroneous because of such individual's entitlement to monthly insurance benefits under title II of the Social Security Act."

Section 3(b)(1) provides the second component, tier II. It is based solely on railroad earnings and no deduction is made for social security entitlement.

> "(1) The amount of the annuity of an individual provided under subsection (a) of this section shall be increased by an amount equal to seven-tenths of a per centum of the product which is obtained by multiplying such individual's "years of service" by such individual's "average monthly compensation" as determined under this subsection. The annuity amount payable to the per centum of the annuity amount computed for such individual under Subsection (h)(1) or (h)(2) and subsection (h)(5), of this section without regard to section

7(c)(i) of this Act. An individual's "average monthly compensation" for purpose of this subsection shall be the quotient obtained by dividing by 60 such individual's total compensation for the 60 months consecutive or otherwise, during which such individual received that individual's highest monthly compensation, except that no part of any month's compensation in excess of the maximum amount creditable for any individual for such month under subsection (j) of this section shall be recognized. In determining the months of compensation to be used for purposes of this subsection, the total compensation reported for the individual under section 9 of this Act or credited to such individual under subsection (j) of this section for a year divided by the number of months of service credited to such individual under subsection (i) of this section with respect to such year shall be considered the monthly compensation for the individual for each month of service in any year for which records of the Board do not show the amount of compensation paid to the individual on a monthly basis. If the "average monthly compensation" computed under this subsection is not a multiple of $1, it shall be rounded to the next lower multiple $1."

The age reduction provision is described in section 3(L)(2):

"(2) The reduction required under section 2(a)(1)(III) or section 2(c)(2) may be applied separately to each of the annuity amounts computed under subsection (a), (b), and (h) of this section and subsections (a), (b),

and (e) of section 4. For this purpose, in any case in which an annuity amount was computed for an individual under the provision of this Act or of Public Law 93-445 prior to October 1, 1981, an annuity amount computed under subsections (a), (b), and (c), (d) and (h) of this section (a), (b), or (e) of section 4, and section 204 or section 206 of Public Law 93-445 shall be reduced by its proportionate share of the reduction on account of age. For purposes of the preceding sentence, annuity amounts computed for an individual under subsections (b), (c), and (d) of section 3 prior to October 1981 shall be considered as one annuity amount."

Section 3(g)(1) of the Railroad Retirement Act provides for cost of living increases in the tier II component.

"(1) Effective with the date of any increase after January 31, 1984, in monthly insurance benefits under the Social Security Act which occurs, or which would have occurred had there not been a general benefit increase under that Act, pursuant to the automatic cost-of-living provision of section 215(i) of the Act, that portion of the annuity of an individual which is computed under subsection (b) of this section shall, if such individual's annuity under section 2(a)(1) of this Act began to accrue on or before the effective date of a particular increase under this subdivision, be increased by 32.5 per centum of the percentage increase in the index which is used or which would have been used had there not been a general benefit increase under the

> Social Security Act, in increasing benefits under the Social Security Act, pursuant to the automatic cost of living provisions of section 215(i) of that Act. Any increase under this subsection shall not be deferred and shall be reflected in all payments made to annuitants after such increase under this subsection becomes effective."

The Board's regulations governing the beginning date of an annuity are located at 20 C.F.R. § 218.9 as follows:

> § 218.9 When an employee annuity begins,
>
> (a) Full-age annuity -- employee has completed ten years but less than 30 years of service. An employee full-age annuity begins on the later of either the date chosen by the applicant or the earliest date permitted by law. The earliest date permitted by law is the latest of --
>
> (1) The day after the day the claimant last worked for a railroad employer;
>
> (2) The first day of the month in which the claimant attains age 65; or
>
> (3) The first day of the sixth month before the month in which the application is filed.
>
> (b) Reduced-age annuity -- employee has completed ten years but less than 30 years of service. An employee reduced-age annuity begins on the later of either the date chosen by the applicant, or the earliest date permitted by law. The earliest date permitted by law is the latest of--
>
> (1) The day after the day the claimant last worked for a railroad employer;

(2) The first day of the first full month in which the claimant is age 62; or ....

Section 260.5(g) of the Board's Regulations provide that where the hearings officer finds that there are no issues of fact to be resolved in an appeal, and the only issues involve a question of the application or interpretation of law, the appellant shall be afforded full opportunity to submit written evidence but no oral hearing shall be held.

EVIDENCE CONSIDERED

The hearings officer has considered the entire record in this case, consisting of arguments presented by the appellant and the documents listed in the index of the administrative record attached to this decision.

SUMMARY AND EVALUATION OF THE EVIDENCE

As stated in the procedural history, the appellant filed for a disability annuity under the Railroad Retirement Act on May 22, 1978. He appealed the denial of his disability annuity up to, but not beyond, the Three Member Board level. The unappealed Board Order dated May 10, 1981

(Exhibit 8) is administratively final. While the appellant successfully appealed the denial of his social security disability benefits to Federal Court, the Court's decision awarding benefits retroactive to the April of 1977 is not binding on the Board. The appellant's entitlement is based on age. The beginning date of his annuity is established as May 1, 1985, the first full month he was age 62, based on his application filed April 24, 1985.

The tier I amount of an annuity rate is computed in the same manner as a social security benefit and is equivalent to the amount of the benefit an employee would receive under the provisions of the Social Security Act if all of his railroad earnings were creditable under that Act. However, the full amount of any social security benefit to which an employee is entitled, as of the time of filing or to which he becomes entitled in the future, must be deducted from this amount at the time of social security entitlement. The tier II amount, on the other hand, is computed using exclusively railroad

compensation.

One of the elements of the Railroad Retirement Act of 1974 provided that the Social Security Administration certify to the Board for payment, a social security benefit for a railroad retirement beneficiary, so that when the railroad annuity is adjusted for the social security benefit, any overpayment due to that benefit entitlement may be withheld from the accrual otherwise due, in order to recover the overpayment. The Social Security Administration is responsible for computing the amount of their benefit and advising the Board of any other recoveries (i.e. for overpayments, attorney fees, etc.) they wish the Board to withhold when the benefit is paid. The Board does not have the authority to readjudicate the appellant's social security benefit amount. Any questions or protests of the amount of that benefit or withholdings from it (other than amounts withheld to recover an Railroad Retirement Board overpayment) should be directed to the Social Security Administration.

In the appellant's case, his railroad annuity tier I is reduced to zero, after the reduction for his social security benefit is applied, as illustrated below:

Effective Date	05/01/85	12/01/85	01/01/86	12/01/86
Gross Tier I	$485.00	$472.00	$487.00	$493.00
Age Reduction	- 89.00	- 91.79	- 94.70	-95.86
Social Security Ben.	-522.00	-569.00	-569.00	-576.00
Net Tier I	-0-	-0-	-0-	-0-

Effective Date	12/0/87	12/01/88	12/01/89	12/01/90
Gross Tier I	$514.00	$534.00	$559.60	$589.00
Age Reduction-	99.95	-103.83	-108.70	-114.53
Social Security Ben.	-600.00	-624.00	-654.00	-689.00
Net Tier I	-0-	-0-	-0-	-0-

The appellant's Tier II is based on his average monthly compensation (AMC) of the highest 60 months of railroad earnings, multiplied by the years of service, and by the ratio .007. His high-60 AMC is $322.00. His basic tier II is $33.81, as shown: $322.00 x 15 x .007 = $33.81.

Because the appellant retired 35 months prior to attainment of age 65, a reduction of 35/180 applies to each tier.

The appellant's tier II (and final annuity rate) computations are as follows:

Effective Date	05/01/85	12/01/85	01/01/86	12/01/86
Basic Tier II	$ 33.81	$ 33.81	$ 33.81	$ 33.81
Age Reduction	- 6.57	- 6.57	- 6.57	- 6.57
Net Tier I	$ 27.24	$ 27.24	$ 27.24	$ .11
				$ 27.35
Annuity Rate	$ 27.24	$ 27.24	$ 27.24	$ 27.35

Effective Date	12/0/87	12/01/88	12/01/89	12/01/90
Basic Tier II	$ 33.81	$ 33.81	$ 33.81	$ 33.81
Age Reduction	- 6.57	- 6.57	- 6.57	- 6.57
Cost-of-living Inc.	+ .49	+ .85	+ .42	+ .51
Net Tier II	$ 27.73	$ 28.09	$ 28.51	$ 29.02
Annuity Rate	$ 27.73	$ 28.09	$ 28.51	$ 29.02

The thrust of the appellant's appeal involves a challenge to the Board's authority to process his social security disability benefit, and in so doing, withhold or deduct previous payments for an overlapping period and recover from the accrual the Railroad Retirement Board overpayment caused by his increased benefits. He stated in his appeal that he disagreed with ". . . any/or all withhold offsets accrual due me that was based on a regular retirement annuity or age. The amendments prohibit such deductions on permanent disabilities." As noted above, however, this is not true. The hearings officer has reviewed the appellant's payment history and finds that it is correct.

FINDINGS

1. The appellant filed for a disability annuity on May 22, 1978, was denied and did not appeal the Three Member Board's decision to Federal Court.
2. The Appellant's Railroad Retire ment Board disability denial is administratively final.
3. The appellant filed for an age-and-service annuity under the Railroad retirement Act on April 24, 1985.
4. The appellant is entitled to a retire ment annuity based on age beginning May 1, 1985, the first full month he was age 62.
5. The appellant successfully appealed a denial of social security disability benefits, which granted him payment retroactive to April 1, 1977.
6. The Social Security Administration certified payment of the disability benefit to the Railroad Retirement

Board.

7. In accordance with law, the Board ad justed the appellant's annuity for his disability SSA benefit and paid the accrual due him after recovery of a Railroad Retirement Board overpayment caused by his disability benefit, af ter recovery of attorney fees, and after deduction of previous social security benefits based on age.

8. The appellant's annuity rates from May 1, 1985 are correct.

CONCLUSION

The appellant's claim is denied.

Richard T. Murphy
Hearings Officer

RAILROAD RETIREMENT
BOARD ORDER 92-144

Appeal of William S. Funderburg R.R.B. No. A-238-20-5913 May 14, 1992	Railroad Retirement Act Claims Appeal Docket No. 3497

The Board has reviewed the record in the appeal of Mr. William S. Funderburg from the decision of the hearings officer and has considered the argument and evidence contained therein.

The appellant filed an application for a disability annuity under the Railroad Retirement Act on May 22, 1978. This application was denied and Mr. Funderburg appealed the denial under the administrative appeals procedures to the Board. The Board affirmed the denial on December 10, 1981. Mr. Funderburg did not appeal the Board's decision to a United States Court of Appeals and, accordingly, that decision became final and binding. 45 U.S.C. § 231(g) and 45 U.S.C. §

355(f) and (g). A majority of the Board affirms the decision of the hearings officer not to reopen the final decision with respect to the application filed May 22, 1978.

The appellant filed an application for an age and service annuity under the Railroad Retirement Act on April 24, 1985. He was awarded an age and service annuity, reduced for early retirement, effective May 1, 1985. Based on its consideration of the record in this case, the Board finds that the appellant is entitled to a disability annuity under section 2(a)(1)(v) of the Railroad Retirement Act based on the application he filed on April 24, 1985.

The appellant is awarded an annuity under section 2(a)(1)(v) of the Railroad Retirement Act with an annuity beginning date no earlier than April 1, 1984. 45 U.S.C. § 231d(a)(ii).

The appeal is denied in part and granted in part.

GLEN L. BOWER

ANDREW F. REARDON

C. J. CHAMBERLAND (Dissenting Opinion attached)

Dissent of C. J. Chamberlain
for the appeal of
William S. Funderburg A 238-20-5913

Mr. Funderburg filed for a social security disability and Railroad Retirement disability benefit, April 1977 and May 1978, respectively.

Both disabilities were denied. His final appeal on the Railroad Retirement disability made it all the way to the three-member Board but not beyond. The Board denied the claim in December 1981.

He eventually was granted a Social Security disability in November 1988 retroactive to April 1977.

It appears that the Board should now review its original decision in view of the subsequent Social Security Administration ruling.

This case has certain similarities to Ronald M. Sones v. Railroad Retirement Board No. 901842

(U.S. Court of Appeals for the Eighth Circuit) dated June 5, 1991.

In the Sones case, the disability applicant was denied a benefit from the Railroad Retirement Board on Board appeal on May 30, 1989.

Mr. Sones' attorney requested that the Board reopen the decision in view of a Social Security Administration grant of a disability benefit to the appellant.

The Board refused, but the court ruled that the case should be reopened because of Social Security's decision.

In view of the above, we must dissent from the majority decision and feel that the Board should review its original December 1981 denial.

_____

C. J. CHAMBERLAIN

_____

Date

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 31, 1994

No. 93-1579
A-238-20-5913

WILLIAM S. FUNDERBURG
Petitioner

v.

U.S. RAILROAD RETIREMENT BOARD
Respondent

****

On Petition for Rehearing with Suggestion for Rehearing in Banc

****

The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

Social Security Act § 205(g), 42 U.S.C.A. § 405(g) (West 1991):

(g) Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript

of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such

evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

NOTE: Statute has been amended from version in effect as of decision in Califano v. Sanders, 430 U.S. 99 (1970 as follows:

> 1980 Amendment. Subsec. (g). Pub.L. 96-265, § 307, substituted "The court may, on motion

of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding;" for "The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary,".

Railroad Retirement Act § 2(a)(1)(iii) and (v), 45 U.S.C.A. §§ 231a(a)(1)(iii) and (v):

§ 231a. Annuity eligibility requirements

(a) Individuals eligible for annuities; disability standards; proof of continued disability

(1) The following described individuals, if they shall have completed ten years of service and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e), (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title-

* * * *

(iii) individuals who have attained the age of sixty-two and have completed less than thirty years of service, but the annuity of such individuals shall be reduced by 1/180 for each of the first 36 months that he or she is under retirement age (as defined in section 216(l) of the Social Security Act [42 U.S.C.A. § 416(l)] when the annuity begins to accrue and by 1/240 for each additional month that he or she is under retirement age (as defined in section 216(l) of the Social Security Act [42 U.S.C.A. § 416(l)] when the annuity begins to accrue;

* * * *

(v) individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

Railroad Retirement Act § 8, 45 U.S.C.A. § 231g (West 1986):

§ 231g. Court jurisdiction

Decisions of the Board determining the rights or liabilities of any person under this subchapter shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act [45 U.S.C.A. § 351 et seq.] except that the time within which proceedings for the review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.

Railroad Unemployment Insurance Act § 5(c), 45 U.S.C.A. § 355(c)(West Supp. 1994):

§ 355. Claims for benefits

(c) Hearing and review of decisions on claims

(1) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection, shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto. In any such case the Board or the person or reviewing body so established or assigned shall, by publication or otherwise, notify all parties properly interested of their right to participate in the hearing and of the time and place of the hearing.

(2) Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the

proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication of otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, or the time and place of the hearing. At the request of any party properly interested the Board shall provide for hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

(3) Any base-year employer of a claimant whose claim for benefits has been granted in whole or in part, either in an initial determination with respect thereto or in a determination after a hearing pursuant to paragraph (1), and who contends that the

determination is erroneous for a reason or reasons other than a reason that is reviewable under paragraph (4), many appeal to the Board for review of such determination. Despite such an appeal, the benefits awarded shall be paid to such claimant, subject to recovery by the Board if and to the extent found on the appeal to have been erroneously awarded. The Board shall take such action as is appropriate to recover the amount of such benefits including if feasible adjustment in subsequent payments pursuant to the first two paragraphs of section 352(d) of this title. Upon an appeal, the Board shall review the determination appealed from and for such review may designate one of its officers or employees to receive evidence and report to the Board thereof together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party

properly interested the Board shall provide for a hearing, and my provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

(4) In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this chapter but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this chapter, regardless of whether or not any claims for

benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that any person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

(5) Final decision of the Board in the cases provided for in the preceding three paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party

notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.

(6) For purposes of this subsection and subsections (d) and (f) of this section, any base-year employer of the claimant is a properly interested party.

(7) Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than

pursuant to this subsection and subsection (f) of this section.

NOTE: Statute has been amended from version in effect as of decision in Steebe v. United States Railroad Retirement Bd., 708 F.2d 250 (7th Cir.), cert. denied, 464 U.S. 997 (1983) as follows:

> 1988 Amendment. Subsec. (c)(1). Pub.L. 100-647, § 7104 (b)(1), (2), designated first unnumbered paragraph as par. (1) and, in par. (1) as so designated, inserted provision that the Board, person, or reviewing body established or assigned, by publication or otherwise, notify all parties properly interested of their right to participate in the hearing and of the time and place of the hearing.
> Subsec. (c)(2). Pub.L. 100-647 § 7104(b)(3), designated second unnumbered paragraph as par. (2).
> Subsec. (c)(3). Pub.L. 100-647 § 7104(b)(4), added par. (3).
> Subsec. (c)(4). Pub.L. 100-647 § 7104(b)(5), designated third unnumbered paragraph as par. (4).
> Subsec. (c)(5). Pub.L. 100-647, § 7104(b)(6(, (7), designated fourth unnumbered paragraph as par. (5) and, in par. (5) as so designated, substituted "three" for "two".
> Subsec. (c)(6), Pub.L. 100-647, § 7104(b)(8), added par. (6).
> Subsec. (c)(7). Pub.L. 100-647, § 7104(b)(9), designated last unnumbered paragraph as par. (7).

Railroad Unemployment Insurance Act § 5(f), 45 U.S.C.A. § 355(f)(West Supp. 1994):

(f) Review of final decision of Board by Courts of Appeals; costs

Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act [45 U.S.C.A. § 151 et seq.], of which claimant is a member or any base-year employer of the claimant, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals of the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated

by it for such purpose. A copy of such petition also shall forthwith be served upon any other properly interested party, and such party shall be a party to the review proceeding. Service may be made upon the Board by registered mail addressed to the Chairman. Within thirty days after receipt of service, or within such additional time as the court may allow, the Board shall file with the court in which such petition has been filed the record upon which the findings and decision complained of are based, as provided in section 2112 of Title 28. upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein. It shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause of rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken

before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

NOTE: Statute has been amended from version in effect as of decision in Steebe v. United States Railroad Retirement Bd., 708 F.2d 250 (7th Cir.), cert. denied, 464 U.S. 997 (1983) as follows:

> 1981 Amendment. Subsec. (f). Pub.L. 97-35, substituted "within thirty days" for "within fifteen days."
> 1984 Amendment. Subsec. (f). Pub.L. 98-620, struck out provision requiring the court to give precedence in the adjudication of the petition over all other civil cases not otherwise entitled by law to precedence.

1988 Amendment. Subsec. (f). Pub.L. 100-647, § 7104(c), inserted "or any base-year employer of the claimant, " after "member," and inserted provision that a copy of the petition be served upon any other properly interested party, and such party be a party to the review proceeding.

BOARD ORDER 75-5, Section 17

17. REOPENING OF FINAL DECISIONS ON CLAIMS FOR BENEFITS UNDER THE RAILROAD RETIREMENT ACT AND DELEGATION OF AUTHORITY TO REOPEN SUCH DECISIONS IN CERTAIN CASES

Reopening of final decisions on claims for benefits under the Railroad Retirement Act shall be governed by the following provisions:

****

B. Reopening of an erroneous decision denying a claim and of a certification with a view to increasing the amount thereof.

A decision denying a claim, which decision is subsequently found to be erroneous, may be reopened. A final certification may be reopened with a view to increasing the amount thereof. Factors to be taken into consideration in determining whether such a decision or certification is to be reopened include, but are not limited to, the following.

(1) The responsibility of the applicant in not providing the new evidence, if any, upon which

the request for reopening is based, at the time the original claim was made or at some other time prior to the date of the request for reopening;

(2) The weight or probative value of any new evidence;

(3) The responsibility of the Rail road Retirement Board in previously applying law or evaluating evidence incorrectly;

No. 94-370

NOV 4 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM S. FUNDERBURG, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

CATHERINE C. COOK
General Counsel
Railroad Retirement Board
Chicago, Ill. 60611-2092

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the United States Railroad Retirement Board's decision not to reopen petitioner's 1978 application for disability benefits was judicially reviewable.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Aspros v. *Railroad Retirement Bd.*, 904 F.2d 384 (7th Cir. 1990)	2
Bennett v. *Tucker*, 827 F.2d 63 (7th Cir. 1987)	9, 10
Burleson v. *Railroad Retirement Bd.*, 711 F.2d 861 (7th Cir. 1983)	2
Califano v. *Sanders*, 430 U.S. 99 (1977)	5, 6, 7, 8, 10
Interstate Commerce Commission v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987)	8
Sones v. *United States Railroad Retirement Bd.*, 933 F.2d 636 (8th Cir. 1991)	4, 8-9, 10
Steebe v. *United States Railroad Retirement Bd.*, 708 F.2d 250 (7th Cir.), cert. denied, 464 U.S. 997 (1983)	5, 7, 8, 9
Szostak v. *Railroad Retirement Bd.*, 370 F.2d 253 (2d Cir. 1966)	9

Statutes and regulations:

Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*:	
45 U.S.C. 231a(a)(1)(v)	5
45 U.S.C. 231b(m)	5
45 U.S.C. 231g(§ 8)	2-3, 10
Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*	3
45 U.S.C. 355(c) (1988 & Supp. IV 1992)	3, 7, 8
45 U.S.C. 355(f) (1988 & Supp. IV 1992)	3, 7, 8
45 U.S.C. 355(g)	3

Statutes and regulations—Continued: Page

45 U.S.C. 405(g) 6
20 C.F.R.:
Section 220.3 2
Section 404.1504 2

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-370

WILLIAM S. FUNDERBURG, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-23) is unpublished, but the decision is noted at 23 F.3d 400 (Table). The decisions of the Railroad Retirement Board (Pet. App. 40-43) and the Hearings Officer (Pet. App. 24-39) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1994. A petition for rehearing was denied on May 31, 1994. Pet. App. 44-45. The petition for a writ of certiorari was filed on August 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. 231 *et seq.*, former railroad employees "whose permanent physical or mental condition is such that they are unable to engage in any regular employment" are entitled to disability annuities. 45 U.S.C. 231a(a)(1)(v). The Railroad Retirement Board (Board), which administers the disability annuity program, has promulgated regulations governing disability determinations. The Board's regulations are substantially similar to those used by the Social Security Administration (SSA) to determine disability under the Social Security Act.[1] The Board's regulations provide, however, that "[d]eterminations of the Social Security Administration or any other governmental or nongovernmental agency about whether or not a claimant is disabled under the laws, regulations or standards administered by that agency shall be considered by the Board but are not binding on the Board." 20 C.F.R. 220.3. The SSA's regulations similarly provide that "a determination made by another agency that you are disabled * * * is not binding on us." 20 C.F.R. 404.1504.

Section 8 of the RRA, which governs judicial review of Board decisions under the Act, provides as follows:

> Decisions of the Board determining the rights or liabilities of any person under this subchapter shall be subject to judicial review in the same manner,

---

[1] Prior to the codification of the Board's current regulations, the Board applied Social Security regulations in determining disability under the Railroad Retirement Act. See, *e.g.*, *Aspros* v. *United States Railroad Retirement Bd.*, 904 F.2d 384, 386 (7th Cir. 1990); *Burleson* v. *Railroad Retirement Bd.*, 711 F.2d 861, 862-863 (8th Cir. 1983).

> subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act [45 U.S.C. 351 *et seq.*] except that the time within which proceedings for the review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.

45 U.S.C. 231g. The Board's review of claims for benefits under the Railroad Unemployment Insurance Act (RUIA) is governed by 45 U.S.C. 355(c) (1988 & Supp. IV 1992). Judicial review is governed by 45 U.S.C. 355(f), which permits a petition for review in the courts of appeals to be brought by "[a]ny claimant, or any railway labor organization * * * of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section." The exclusivity of this provision is established by 45 U.S.C. 355(g), which states that "[f]indings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund [and] the determination of any other matter pursuant to subsection (c) of this section * * * shall not be subject to review in any manner other than that set forth in subsection (f) of this section."[2]

Neither the RRA nor the RUIA alludes to the reopening of final decisions by the Board. However,

---

[2] Similarly, 45 U.S.C. 355(c) (1988 & Supp. IV 1992) provides that "[a]ny issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section."

Consolidated Board Order 75-5 provides that the Board may reopen final decisions on claims for RRA benefits. That Order states that the

> [f]actors to be taken into consideration in determining whether such a decision or certification is to be reopened include, but are not limited to, the following:
>
> (1) The responsibility of the applicant in not providing the new evidence, if any, upon which the request for reopening is based, at the time the original claim was made or at some other time prior to the date of the request for reopening;
>
> (2) The weight or probative value of any new evidence;
>
> (3) The responsibility of the Railroad Retirement Board in previously applying law or evaluating evidence incorrectly.

Consolidated Board Order 75-5, ¶ 17B (quoted in *Sones* v. *United States Railroad Retirement Bd.*, 933 F.2d 636, 637-638 (8th Cir. 1991)); see Pet. App. 63-64.

2. On May 22, 1978, petitioner William S. Funderburg filed an application for a disability annuity under the RRA. After receiving an initial decision denying his claim, petitioner appealed the decision to an appeals referee and then to the Board. On December 10, 1981, the Board issued a final decision denying petitioner's appeal. Petitioner did not seek judicial review of that decision. Petitioner's application for Social Security disability benefits was also denied. Petitioner did, however, seek judicial review of the denial of his application for Social Security disability benefits. Pet. App. 24; Pet. 4-5.

On April 24, 1985, petitioner applied for a reduced-age retirement annuity under the RRA. He was awarded an annuity beginning May 1, 1985, and he continued to

receive benefits for the next four years. In 1989 petitioner's RRA annuity was reduced after the Board was informed that the Social Security Appeals Council, on remand from the United States District Court, had awarded petitioner Social Security disability benefits retroactive to April 1, 1977. Pet. App. 24-25.[3]

Petitioner pursued administrative appeals of the Board's action reducing his RRA annuity, arguing, *inter alia*, that his 1978 application for an RRA disability annuity should be reopened. On May 14, 1992, the Board "affirm[ed] the decision of the hearings officer not to reopen the final decision with respect to the application filed May 22, 1978." Pet. App. 41. The Board did, however, reexamine petitioner's 1985 application for a reduced-age RRA annuity. "Based on its consideration of the record in this case," the Board determined that petitioner was "entitled to a disability annuity under [45 U.S.C. 231a(a)(1)(v)] based on the application he filed on April 24, 1985." Pet. App. 41.

3. Petitioner then filed a petition for review in the United States Court of Appeals for the Fourth Circuit, challenging the Board's refusal to reopen its denial of his 1978 application for a disability annuity. The court dismissed the petition for review for lack of subject matter jurisdiction. Pet. App. 20-23. Relying on *Califano* v. *Sanders*, 430 U.S. 99, 107-108 (1977), and *Steebe* v. *United States Railroad Retirement Bd.*, 708 F.2d 250, 254-255 (7th Cir.), cert. denied, 464 U.S. 997 (1983), the court held that "[a]bsent extraordinary circumstances, a decision of the Railroad Retirement Board not to reopen an earlier denial of a claim is not subject to judicial

---

[3] When an employee qualifies for benefits under both the RRA and the Social Security Act, the RRA benefits must be reduced by the amount of the Social Security benefits. 45 U.S.C. 231b(m).

review. * * * Therefore, since [petitioner] does not challenge the constitutionality of the Board's decision, this Court lacks jurisdiction to review the Board's decision not to reopen the case." Pet. App. 22-23.

ARGUMENT

The decision of the court of appeals is compelled by the statutory provisions governing judicial review of Board decisions, and by this Court's ruling in *Califano* v. *Sanders*, 430 U.S. 99 (1977). Although one court of appeals has permitted judicial review of the Board's refusal to reopen its denial of RRA disability benefits, we do not believe that the circuit conflict requires resolution by this Court at the present time.

1. In *Califano* v. *Sanders*, this Court held that the Social Security Act did not authorize judicial review of the decision by the Secretary of Health, Education, and Welfare not to reopen the denial of a claim for benefits under the Act. The Court held that 42 U.S.C. 405(g), which permitted judicial review of "any final decision of the Secretary made after a hearing," did not apply to the Secretary's refusal to reopen a prior decision. 430 U.S. at 108. The Court rested its decision in part on the facts that "a petition to reopen a prior final decision may be denied without a hearing" and that "the opportunity to reopen final decisions and any hearing convened to determine the propriety of such action are afforded by the Secretary's regulations and not by the Social Security Act." *Ibid.* The Court noted as well that to permit judicial review of refusals to reopen would subvert the statutory time limit for challenging the Secretary's final decision on the initial claim for benefits. *Ibid.* It stated: "Congress' determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall

repetitive or belated litigation of stale eligibility claims. Our duty, of course, is to respect that choice." *Ibid.*[4]

The statutory scheme governing judicial review of the Board's determinations is closely analogous to that which was at issue in *Sanders*. See *Steebe* v. *United States Railroad Retirement Bd.*, 708 F.2d 250, 255 (7th Cir.) ("Although *Sanders* addressed reopening under the Social Security Act, the reasoning in *Sanders* is equally applicable to the RRA."), cert. denied, 464 U.S. 997 (1983). Like the Social Security provisions at issue in *Sanders* (which authorized judicial review of "any final decision of the Secretary made after a hearing," 430 U.S. at 108), the RRA and RUIA restrict judicial review to a carefully defined category of Board decisions. A petition for review may be filed by any person "aggrieved by a final decision under subsection (c) of this section [45 U.S.C. 355(c)]." 45 U.S.C. 355(f) (1988 & Supp. IV 1992). Like the Secretary's refusal to reopen Social Security claims, the Board decision that petitioner seeks to challenge does not fall within the category of Board decisions subject to judicial review. "A decision by the Board not to reopen an application would not come within the terms of subsection (c) of section 355 of the RUIA; only an appeal from the original denial of the application for benefits would fit within subsection (c)." *Steebe*, 708 F.2d at 254.[5]

---

[4] The Court suggested, however, that judicial review might be available in "those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds." 430 U.S. at 109.

[5] The statute makes clear that no alternative avenue for judicial review is available. See 45 U.S.C. 355(g) ("Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund * * * shall not be subject to review in any

As with the Social Security scheme at issue in *Sanders*, moreover, the Board's authority to reopen the prior denial of a claim rests on a Board regulation and not on the governing statute. And as with the Social Security Act, to permit judicial review of refusals to reopen would subvert Congress's effort "to forestall repetitive or belated litigation of stale eligibility claims." *Sanders*, 430 U.S. at 108; see *Steebe*, 708 F.2d at 255. This Court's decision in *Sanders* therefore compels the conclusion that the Board's refusal to reopen its denial of petitioner's 1978 application is not subject to judicial review.[6]

2. Petitioner principally relies (Pet. 13-18) upon *Sones* v. *United States Railroad Retirement Bd.*, 933 F.2d 636 (8th Cir. 1991), in which the court of appeals entertained a petition for review of the Board's refusal to reopen a prior denial of disability benefits under the

---

manner other than that set forth in subsection (f) of this section.").

[6] *Interstate Commerce Comm'n* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), is not to the contrary. The Court in *Locomotive Engineers* held that the ICC's refusal to reopen a prior decision was judicially reviewable (under an abuse of discretion standard) "[i]f the petition that was denied sought reopening on the basis of new evidence or changed circumstances." 482 U.S. at 284. In that case, however, the pertinent statute authorized judicial review of any "final order" of the Commission, see *id.* at 277; the Court noted as well that "[t]he Commission's authority to reopen and reconsider its prior actions stems from 49 U.S.C. § 10327(g)." 482 U.S. at 277. Here, by contrast, judicial review is available only for "final decision[s] under subsection (c) of this section [*i.e.*, 45 U.S.C. 355(c)]," 45 U.S.C. 355(f) (1988 & Supp. IV 1992); and the Board's authority to reconsider its earlier rulings is grounded in its own regulations rather than in the statute itself. The present case is therefore controlled by *Sanders* rather than by *Locomotive Engineers*.

RRA. The court held that the Board had abused its discretion in declining to reopen the earlier decision in light of the ruling of a Social Security ALJ that the claimant was entitled to disability benefits under the Social Security Act. *Id.* at 637-638. We acknowledge that the Eighth Circuit's reasoning in *Sones* cannot be squared with that of the Fourth Circuit in the instant case. For two reasons, however, we do not believe that the conflict requires resolution by this Court at the present time.

a. The Eighth Circuit in *Sones* did not discuss, or even cite, the statutory provisions governing judicial review of the Board's decisions. It also did not cite *Sanders* v. *Califano*, but relied exclusively on *Szostak* v. *Railroad Retirement Bd.*, 370 F.2d 253, 254-255 (2d Cir. 1966), a case that well predated *Sanders*. See 933 F.2d at 638. Given the Eighth Circuit's failure to discuss the most relevant authorities, we believe that other courts of appeals are unlikely to find its analysis persuasive.[7]

---

[7] The Eighth Circuit minimized the significance of *Steebe*, asserting that "the Seventh Circuit has limited its own holding in *Steebe* * * * to the specific facts of that case." *Sones*, 933 F.2d at 638 n.2 (citing *Bennett* v. *Tucker*, 827 F.2d 63, 73 n.7 (7th Cir. 1987)). That statement is literally true but seriously misleading. The defendant in *Bennett* relied upon *Steebe* for the broad proposition that the State's decision to "close" an individual's claims precluded a subsequent constitutional challenge to the State's action. 827 F.2d at 72-73. The court rejected that contention, noting that *Steebe* "turned on [its] specific facts, and thus ha[s] no relevance in this action. In *Steebe*, we held that Congress had divested the federal courts of jurisdiction to review the Railroad Retirement Board's decision not to reopen a claim." 827 F.2d at 73 n.7. Although the *Bennett* court thus "limited" *Steebe* to the context of Board refusals to reopen, it did not suggest that the unavailability of judicial review otherwise turned on the peculiar facts at issue in *Steebe*.

b. The claimant in *Sones* received the final decision of the Board, denying his claim for RRA disability benefits, on May 30, 1989. 933 F.2d at 637. Less than five months thereafter (on October 6, 1989), Sones requested that the Board reopen its decision in light of the favorable Social Security ruling. *Ibid.* Thus, at the time he requested reopening, Sones had a live, appealable claim. See 45 U.S.C. 231g (establishing a one-year period for seeking judicial review of Board decision with respect to an annuity under the RRA). Although the Eighth Circuit did not rely on that fact in explaining its decision to exercise jurisdiction, it is clear that Sones's petition for review did not raise the same danger of "repetitive or belated litigation of stale eligibility claims," *Sanders*, 430 U.S. at 108, as did the petition for review in the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

CATHERINE C. COOK
General Counsel
Railroad Retirement Board

NOVEMBER 1994